91-1393



No.

# In the Supreme Court of the United States

OCTOBER TERM, 1991

A.L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION
PETITIONER

VS.

BOBBY RAY FRETWELL
RESPONDENT

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTION PRESENTED

WHETHER THE UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT RESPONDENT FRETWELL WAS DENIED HIS SIXTH AMENDMENT AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL FELONY MURDER TRIAL IN THAT HE SUFFERED PREJUDICE WHEN HIS TRIAL COUNSEL FAILED TO MAKE A "DOUBLE-COUNTING" OBJECTION, BASED ON THE EIGHTH CIRCUIT'S HOLDING IN *COLLINS V. LOCKHART,* 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985), TO THE TRIAL COURT'S SUBMISSION TO THE JURY OF THE AGGRAVATING CIRCUMSTANCE OF PECUNIARY GAIN IN LIGHT OF THE FACT THAT *COLLINS* HAD BEEN DECIDED CONTRARY TO THE JOINT OPINION OF THIS COURT IN *JUREK V. TEXAS*, 428 U.S. 262 (1976).

## TABLE OF CONTENTS





## TABLE OF AUTHORITIES

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

A. L. Lockhart, Director, Arkansas Department of Correction, the petitioner, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

## OPINIONS BELOW

The opinion of the United States Eighth Circuit Court of appeals is reported as *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991), and is reprinted in the appendix to this petition. The opinion of the United States District Court for the Eastern District of Arkansas is reported as *Fretwell v. Lockhart*, 739 F. Supp. 1334 (E.D. Ark. 1990), and is reprinted in the appendix to this petition. The appendix also includes the Eighth Circuit's order denying petitioner Lockhart's petition for rehearing and suggestion for rehearing *en banc*, that was issued on December 4, 1991. The appendix also includes the Eighth Circuit's order recalling the mandate in the instant case, which was issued on December 30, 1991.

## JURISDICTION

The Eighth Circuit Court of Appeals handed down its opinion in the instant case on September 23, 1991. This decision was rendered by a three-judge panel of the court. Petitioner Lockhart petitioned for rehearing and for rehearing *en banc*. The *banc* of the Eighth Circuit Court of Appeals denied petitioner Lockhart's petition for rehearing and petition for rehearing *en banc*. Five judges for the Eighth Circuit Court of Appeals, Judges Fagg, Bowman, Wollman, Beam and Loken, voted to grant petitioner Fretwell's petition for rehearing *en banc*. The *banc* of the Eighth Circuit Court of Appeals denied petitioner Lockhart's petition for rehearing and petition for rehearing *en banc* on December 4, 1991.

This Court has jurisdiction to review the instant case by writ of certiorari. This Court's jurisdiction to review the instant case by means of the writ of certiorari is set forth in 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "...[A]nd to have the assistance of counsel for his defense...."

The first section of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "...[N]or shall any state deprive any person of life, liberty, or property, without due process of law;...."



## STATEMENT OF THE CASE

This is a petition for writ of certiorari, brought by petitioner A. L. Lockhart, Director, Arkansas Department of Correction, in which he asks this Court to review the decision of the United States Eighth Circuit Court of Appeals in the case of *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991). In *Fretwell v. Lockhart*, the Eighth Circuit Court of Appeals had affirmed a judgment entered by the United States District Court for the Eastern District of Arkansas, pursuant to 28 U.S.C. § 2254, conditionally granting habeas corpus relief to respondent Bobby Ray Fretwell, a prisoner held on Death Row at the Tucker Unit of the Arkansas Department of Correction. The District Court below vacated Fretwell's death sentence and conditioned reduction of Fretwell's sentence to life imprisonment without the possibility of parole on whether the State of Arkansas would agree to resentence Fretwell. (Such a "retrial" of only the penalty phase of a capital murder trial is permissible in Arkansas. *See* Ark. Code Ann. § 5-4-616 (1987)). Both petitioner Lockhart and respondent Fretwell appealed the judgment of the United States District Court for the Eastern District of Arkansas to the United States Eighth Circuit Court of Appeals.

On September 23, 1991, a three-judge panel of the Eighth Circuit Court of Appeals handed down a decision affirming the judgment of the United States District Court for the Eastern District of Arkansas. The Eighth Circuit's opinion is published as *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991). In its opinion, the Eighth Circuit Court of Appeals concluded that the relief that Fretwell was entitled to was not a "retrial" of the penalty phase of his capital felony murder trial, but prohibition of such a "retrial" and reduction of his death sentence to life imprisonment without possibility of parole. Petitioner Lockhart petitioned for rehearing and petitioned the *banc* of the Eighth Circuit for rehearing. The *banc* of the court denied rehearing by a vote of five to five. After the *banc* of the Eighth Circuit Court of Appeals denied rehearing, petitioner Lockhart filed the

instant petition for writ of certiorari with this Court to review the decision of the Eighth Circuit Court of Appeals in *Fretwell v. Lockhart*.

In August of 1985, Fretwell was tried on a charge of capital felony murder in Searcy County Circuit Court. In a trial bifurcated into a guilt/innocence phase and a penalty phase, a jury found Fretwell guilty of capital felony murder, as set forth in Ark. Stat. Ann. § 41-1501(1)(a) (Repl. 1977) (presently codified as Ark. Code Ann. § 5-10-101(a)(1) (1987)). The Searcy County jury found that Fretwell had murdered a man named Sherman Sullins in the course of committing robbery. (The particulars of Fretwell's murder of Sherman Sullins are set forth in detail by the United States District Court for the Eastern District of Arkansas in *Fretwell v. Lockhart*, 739 F. Supp. 1334, 1335 (E.D. Ark. 1990), which is reprinted in the appendix of the instant petition). After the separate penalty phase of Fretwell's trial, the jury sentenced him to death. The state trial court, the Searcy County Circuit Court, had instructed the jury on two aggravating circumstances, "murder committed for the purpose of avoiding or preventing an arrest" and "murder committed for pecuniary gain."[1] The jury found only "murder committed for pecuniary gain" as an aggravating circumstance. Fretwell's trial counsel had failed to object to the submission to the jury of the aggravating circumstance of "murder committed for pecuniary gain" despite the fact that just over six months earlier, on January 31, 1985, the United States Eighth Circuit Court of Appeals had handed down *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985). In *Collins* the Eighth Circuit Court of Appeals had held that the Eighth and Fourteenth Amendment's prohibition against cruel and unusual punishment prohibits the use of "pecuniary gain" as an aggravating circumstance in capital felony murder trials where robbery-murder is the capital offense at issue.

[1]The "avoiding or preventing an arrest" aggravating circumstance is presently codified as Ark. Code Ann. § 5-4-604(5) (1987). The "pecuniary gain" aggravating circumstance is presently codified as Ark. Code Ann. § 5-4-604(6) (1987).



Fretwell directly appealed his conviction and death sentence to the Arkansas Supreme Court. The Arkansas Supreme Court affirmed in *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986). Subsequently, Fretwell petitioned the Arkansas Supreme Court for permission to seek post-conviction relief in Searcy County Circuit Court. Fretwell filed this petition pursuant to Arkansas Rule of Criminal Procedure 37.2(a). The Arkansas Supreme Court denied Fretwell's petition requesting permission to seek post-conviction relief in *Fretwell v. State*, 292 Ark. 96, 728 S.W.2d 180 (1987). Subsequently, Fretwell attacked the validity of his capital felony murder conviction and death sentence by filing a petition seeking habeas corpus relief pursuant to 28 U.S.C. § 2254 with the United States District Court for the Eastern District of Arkansas. The results of Fretwell's habeas corpus petition to the District Court for the Eastern District of Arkansas and the resulting appeal to the United States Eighth Circuit Court of Appeals have been noted above.

In deciding the instant case, the United States Eighth Circuit Court of Appeals concluded that Fretwell had suffered a deprivation of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at trial. Specifically, the Eighth Circuit determined that Fretwell's trial counsel was ineffective in that he failed to make a particular objection. The Eighth Circuit concluded that Fretwell's trial counsel was ineffective because he had failed to object at the penalty phase of Fretwell's capital murder trial to the submission to the jury of the aggravating circumstance of "murder committed for pecuniary gain." According to the Eighth Circuit's analysis, Fretwell's trial counsel should have objected to the submission of this aggravating circumstance on the basis of the Eighth Circuit's prior decision in

*Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985).

*Collins* held that the Fourteenth and Eighth Amendments' prohibition against cruel and unusual punishment prohibits a state from the use of pecuniary gain as an aggravating circumstance in capital felony murder cases where the predicate felony for the murder charge is robbery. According to the Eighth Circuit in *Collins*, the Eighth Amendment prohibits the use of pecuniary gain as an aggravating circumstance in robbery-murder capital felony murder trials because pecuniary gain duplicates an element of robbery and, therefore, does not genuinely narrow the class of robbery-murderers into a subclass of robbery-murderers that truly deserves the penalty of death. According to the Eighth Circuit in the instant case, had Fretwell's trial counsel made a *Collins v. Lockhart*-based "double-counting" objection to the submission to the jury of the aggravating circumstance of "murder committed for pecuniary gain," the state trial court would have followed the rationale of *Collins v. Lockhart* and not permitted the submission of the aggravating circumstance to the jury. According to the Eighth Circuit, had the state trial court not submitted to the jury the aggravating circumstance of "murder committed for pecuniary gain," the jury would have acquitted Fretwell of the death penalty. Although the Eighth Circuit does not say so in so many words, apparently it reached this conclusion because, as a matter of what *did* happen at Fretwell's trial, the jury did not find the other aggravating circumstance that had been submitted to it.

Also, the Eighth Circuit concluded that the only relief permitted by the writ of habeas corpus that would remedy Fretwell's deprivation of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at trial was prohibition of any effort by the State of Arkansas to retry the penalty phase of Fretwell's capital felony murder case and reduction of his death sentence to the only other alternative sentence, that being life imprisonment



without possibility of parole. It is the decision by the United States Eighth Circuit Court of Appeals in *Fretwell v. Lockhart*, *supra* that Fretwell was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at the penalty phase of his capital felony murder trial that petitioner Lockhart is asking this Court to review by means of the writ of certiorari.

## ARGUMENT

### THIS COURT SHOULD GRANT CERTIORARI BECAUSE LOWER COURTS NEED GUIDANCE CONCERNING THE MANNER IN WHICH CLAIMS OF PREJUDICE RESULTING FROM INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN DEATH PENALTY CASES ARE TO BE EVALUATED WHEN THE ALLEGED PREJUDICE ARISES FROM FAILURE TO MAKE AN OBJECTION ON THE BASIS OF PERSUASIVE CASE AUTHORITY THAT WAS SUBSEQUENTLY OVERRULED.

This case gives this Court the opportunity to provide guidance to lower courts reviewing criminal cases where the death penalty is imposed when the defendant argues that he suffered from prejudice because of trial counsel's failure to make an objection on the basis of persuasive case authority that was subsequently overruled. In these types of ineffective assistance of counsel cases three principles of constitional law collide. These three principles are: (1) the Eighth Amendment's requirement that death sentences not be imposed in a manner that is arbitrary and capricious; (2) the Sixth Amendment principle, set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), that a defendant's claim of prejudice owing to ineffective assistance of counsel is not to turn on "...the luck of a lawless decisionmaker."; and (3) this Court's practice of applying fully retroactively decisions in criminal or habeas corpus cases that reject claims of deprivation of rights guaranteed by the United States Constitution. Petitioner Lockhart respectfully submits that this is a complex area of Sixth Amendment ineffective assistance of counsel jurisprudence that this Court has never before addressed and that lower courts will be in need of guidance in this difficult area of the law -- particularly so given this Court's recent overruling of precedents where the overruling decision has the effect of rejecting claims in death penalty cases of deprivation of rights guaranteed by the Eighth and Fourteenth Amendments to the United States



Constitution. *See, e.g., Payne v. Tennessee*, 111 S.Ct. 2597 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989)).

At its simplest level, the instant case presents a routine application of the principles of law governing claims of ineffective assistance of counsel that were set forth by this Court in the landmark case of *Strickland v. Washington*, 466 U.S. 668 (1984). This routine issue of ineffective assistance of counsel is as follows: was Fretwell's trial counsel ineffective because he failed to make a particular objection at the sentencing phase of Fretwell's capital felony murder trial. The Eighth Circuit Court of Appeals concluded that Fretwell's trial counsel was ineffective because he had failed to make a particular objection at the penalty phase of Fretwell's trial. Specifically, the Eighth Circuit concluded that Fretwell's trial counsel was ineffective, as measured by the standard set forth by this Court in *Strickland v. Washington, supra*, when trial counsel failed to object to the submission to the jury of the aggravating circumstance of "murder committed for pecuniary gain" in the penalty phase of Fretwell's capital robbery-murder trial. According to the Eighth Circuit, Fretwell's trial counsel should have objected to the submission of pecuniary gain as an aggravating circumstance on the basis of the Eighth Circuit's holding in the case of *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985). According to the Eighth Circuit, Fretwell suffered prejudice when his trial counsel failed to make a *Collins v. Lockhart*-based objection to the submission to the jury of the aggravating circumstance of pecuniary gain.

In *Collins*, the Eighth Circuit Court of Appeals held that the cruel and unusual punishment clause of the Eighth and Fourteenth Amendments prohibit the submission to the jury of the aggravating circumstance of pecuniary gain in death penalty cases where robbery-murder is the capital murder charge at issue. The Eighth Circuit reached this conclusion by postulating the universal truth that every

robber-murderer kills in order to realize a pecuniary gain. *Collins* at 264. From this first principle the Eighth Circuit concluded that a jury would automatically find pecuniary gain as an aggravating circumstance in every robbery-murder case and that, therefore, pecuniary gain "cannot be a factor that distinguishes some robber-murderers from others." *Id.* at 264. According to the Eighth Circuit, such a state of affairs violates the Eighth Amendment's prohibition against cruel and unusual punishment because:

> [a]n aggravating circumstance is an objective criterion that can be used to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the same underlying crime.

*Id.* at 264. In essence, in *Collins* the Eighth Circuit held that the pecuniary gain aggravating circumstance must further narrow a subclass of capital murderers, robber-murderers, that had already been winnowed out of the class of all murderers by Arkansas' designation of robbery-murder as capital murder. To put the matter another way, in *Collins* the Eighth Circuit Court of Appeals held that in capital murder cases, a state cannot "double-count" an attendant circumstance such as the commission of murder in order to realize a pecuniary gain as an element of capital murder and also as an aggravating circumstance that would justify the imposition of the death penalty.

The Eighth Circuit Court of Appeals handed down its decision in *Collins* on January 31, 1985. Approximately six months later, in the first week of August, 1985, Fretwell stood trial for the robbery-murder of Sherman Sullins.

In 1988, *Collins* was effectively overruled. *Collins* was effectively overruled by the decision that this Court handed down in the case of *Lowenfield v. Phelps*, 484 U.S. 231 (1988). In *Lowenfield* this Court held that the Eighth Amendment's prohibition against cruel and unusual punish-



ment does not prohibit in death penalty cases the "double-counting" of an attendant circumstance of a capital murder so that it serves as both an element of the offense and also as an aggravating circumstance that justifies the imposition of a sentence of death. In reaching this conclusion in *Lowenfield*, this Court did nothing more than apply the joint opinion that this Court had rendered twelve years earlier, in 1976, in the case of *Jurek v. Texas*, 428 U.S. 262. In *Lowenfield* this Court held:

> The use of "aggravating circumstances" is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in *Jurek v. Texas*, 428 U.S. 262 (1976), establishes this point. The Jurek Court upheld the Texas death penalty statute, which, like the Louisiana statute, narrowly defined the categories of murders for which a death sentence could be imposed. If the jury found the defendant guilty of such a murder, it was required to impose death so long as it found beyond a reasonable doubt that the defendant's acts were deliberate, the defendant would probably constitute a continuing threat to society, and, if raised by the evidence, the defendant's acts were an unreasonable response to the victim's provocation. *Id.*, at 269. We concluded that the latter three elements allowed the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion. *Id.*, at 271-274. But the opinion announcing the judgment noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of *Gregg, supra*, and *Proffitt, supra*:

While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose....In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances.... Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option -- even potentially -- for a smaller class of murders in Texas. 428 U.S. at 270-271. (citations omitted).

It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. *See also Zant, supra*, at 876, n.13, discussing *Jurek* and concluding:

> "[I]n Texas, aggravating and mittgating circumstances were not considered at the same stage of the criminal prosecution."

Here, the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to



> inflict great bodily harm upon more than one person." The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

*Lowenfield*, at 244-46. In deed, the Eighth Circuit Court of Appeals itself reached the conclusion that this Court's decision in *Lowenfield* overruled its "double-counting" in *Collins v. Lockhart*. The Eighth Circuit acknowledged that *Collins* was no longer a valid Eighth Amendment precedent in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989). In *Perry* the Eighth Circuit held, "[w]e conclude, therefore, that *Collins* can neither be harmonized with nor distinguished from *Lowenfield*, and we therefore deem it to have been overruled by *Lowenfield*." *Perry*, at 1393. Furthermore, in *Perry*, the Eighth Circuit noted that in *Lowenfield* this Court "...did not announce a new rule. It merely applied a rule that had been announced in *Jurek* [*v. Texas*, 428 U.S. 262 (1976)]." *Perry* at 1394. In *Collins* the Eighth Circuit had failed to cite this Court's joint opinion in *Jurek v. Texas*; therefore, *Collins v. Lockhart's* "double-counting" holding was never correct.

The guidance that this Court needs to provide to the lower courts has to do with how the lower courts should evaluate the existence of prejudice with regard to claims ineffective assistance of trial counsel in cases like the instant case. In *Strickland v. Washington*, with regard to

determining whether the defendant suffered prejudice as a result of counsel's ineffectiveness, this Court stated:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.

*Strickland*, at 694-95. Before the Eighth Circuit Court of Appeals, the parties fought it out as to whether the state trial court, the Searcy County Circuit Court, would have followed the "double-counting" rationale of *Collins v. Lockhart* had Fretwell's trial counsel made such an objection to the submission to the jury of pecuniary gain as an aggravating circumstance, assuming that the Searcy County Circuit Court "acted according to law" and "reasonably, conscientiously, and impartially applied[ed] the standards that govern the decision." Petitioner Lockhart argued (and argues) that the Searcy County Circuit Court would not have followed the "double-counting" holding of *Collins* because it was inconsistent with this Court's joint opinion in *Jurek v. Texas, supra*, which was in existence in August of 1985, when Fretwell stood trial on a charge of capital felony murder. Lockhart buttressed this argument by noting that *Lowenfied v. Phelps* had overruled *Collins v. Lockhart* and that in *Lowenfield* this Court had done nothing more than apply *Jurek*. The Eighth Circuit Court of Appeals rejected petitioner Lockhart's



contention that the Searcy County Circuit Court would have followed *Jurek* had Fretwell's counsel made a "double-counting" objection based on *Collins v. Lockhart*. The Eighth Circuit did so by noting that the death penalty sentencing procedure at issue in *Jurek* did not require the jury to balance aggravating circumstances against mitigating circumstances while Arkansas' death penalty sentencing procedure did require such balancing and by noting that the Searcy County Circuit Court was bound as a matter of Supremacy Clause to treat *Collins* as binding precedent with regard to the "double-counting" issue.[2]

Petitioner Lockhart submits that his analysis of whether the state trial court would have followed this Court's decision in *Jurek v. Texas* for purposes of determining whether *Strickland v. Washington*-prejudice occurred when Fretwell's trial counsel failed to make a *Collins v. Lockhart*-based "double-counting" objection is correct and that of the Eighth Circuit Court of Appeals is incorrect. *Jurek* plainly establishes the point that states may perform the required narrowing of the class of all murderers into a subclass of death-eligible murderers at the definitional stage of capital murder and the state trial court, the Searcy County Circuit Court, would have followed *Jurek* and held that Arkansas' death penalty sentencing procedure genuinely narrowed the class of all murderers into a death-eligible subgroup by defining robbery-murder as capital murder. The Eighth Circuit in Fretwell simply fails to explain how the additional step in Arkansas' death penalty procedure of balancing aggravating circumstances

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[2]The Eighth Circuit's Supremecy Clause holding is wrong. *See United States ex rel. Laurence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970); *Owsley v. Peyton*, 352 F.2d 804 (4th Cir. 1965); and 1 R. Rotunda, J. Nowak and J. Young, *Constitional Law* §1.6 nn. 33-4 (1986); *see also Sawyer v. Smith*, 110 S.Ct. 2822, 2831 (1990) ("[s]tate courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution"). The doctrine of stare decisis has nothing to do with the Supremacy Clause.

with mitigating circumstances would have kept the Searcy County Circuit Court from concluding that the required genuine narrowing occurred when robbery-murder was defined as capital felony murder. To put the matter another way, the Searcy County Circuit Court doubtlessly was astute enough to see that even if pecuniary gain was an element of robbery-murder, pecuniary gain could still be balanced in the penalty phase against Fretwell's mitigating evidence.

Lockhart concedes that even though *Collins v. Lockhart* was not a "lawless" decision in the sense that it was the product of whimsy or caprice, *Collins v. Lockhart* was an erroneous decision to the extent that it held that the Eighth Amendment forbids "double-counting." In terms of whether *Strickland v. Washington*-prejudice occurred in a case, petitioner Lockhart submits that just as defendants are not entitled "...to the luck of a lawless decisionmaker," defendants ought not be entitled to the luck of an erroneous decisionmaker. Moreover, whether a decision was erroneous for *Strickland v. Washington*-prejudice purposes is an evaluation that ought not be confined to the circumstances at the time of the defendant's trial, as is the standard for establishing the reasonableness of counsel's conduct, but ought to be evaluated on the basis of the law as it stands when the claim of ineffective assistance of counsel at issue is reviewed. If, at the time the claim of ineffective assistance of counsel is reviewed, the legal landscape has reformed since counsel's ineffective representation and the underlying case law basis for a claim of ineffective assistance of counsel is obviously not good law, then, as the dissenting opinion in *Fretwell v. Lockhart* points out, the defendant will receive a windfall benefit if the analysis of the prejudice prong of the claim of ineffective assistance of counsel does not reflect the subsequent correction of the law. *Fretwell v. Lockhart*, 946 F.2d 579. There is nothing arbitrary or capricious about depriving a defendant sentenced to death of the



erroneous vacation of his death sentence. Indeed, there is something arbitrary in permitting a defendant to escape a death sentence by taking advantage of an erroneous decision by arguing that his trial counsel was ineffective because he did not make an objection on the basis of the erroneous decision.

In closing, petitioner Lockhart notes that not only did the Eighth Circuit Court of Appeals err in determining that Fretwell was deprived of his right to the effective assistance of counsel at the penalty phase of his capital felony murder trial, but the Eighth Circuit also erred in ordering that the proper habeas corpus remedy was prohibtion of retrial of the penalty phase of Fretwell's capital murder trail and reduction of his death sentence to a sentence of life imprisonment without possibiliy of parole. Federal courts conducting habeas corpus review pursuant to 28 U.S.C. §2254 are, when the issuance of the writ is warranted, to "...dispose of the matter as law and justice require" 28 U.S.C. §2243. However, when federal courts issue the writ of habeas corpus they limit the remedy of prohibition of retrial only to those situations where the defendant should never have been brought to trial in the first place, such as when the defendant had a former jeopardy-based right or an *ex post facto*-based right not to be brought to trial at all or where the state has prosecuted the defendant on the basis of a criminal statute that was uncontitutional in some respect. L. Yackle, *Postconviction Remedies* §143 (1981). Deprivation of the Sixth and Fourteenth Amendment right to the effective assistance of counsel does no call into question the ability of the state to bring the defendant to trial in the first place nor does it involve prosecution of the defendant pursuant to an unconstitutional statute. Therefore, the Eighth Circuit Court of Appeals erred in holding that Arkansas is barred from retrying the penalty phase of Fretwell's capital felony murder case.

*CONCLUSION*

Petitioner Lockhart respectfully requests that this Court grant the instant application for the writ of certiorari and that this Court review the decision of the United States Eighth Circuit Court of Appeals in the case of *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991).

Respectfully submitted,

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# APPENDIX

Bobby Ray FRETWELL, Appellee,

v.

A.L. LOCKHART, Director, Arkansas
Department of Correction,
Appellant.

Bobby Ray FRETWELL, Appellant,

v.

A.L. LOCKHART, Director, Arkansas
Department of Correction,
Appellee.

Nos. 90-2105, 90-2315.

United States Court of Appeals,
Eighth Circuit

Submitted January 7, 1991
Decided Sept. 23, 1991.

Clint Miller, Asst. Atty. Gen.,
Little Rock, AR, for appellant.

Richard R. Medlock,
Little Rock, AR, for appellee.

Before LAY, Chief Judge, and
MAGILL and LOKEN, Circuit Judges

MAGILL, Circuit Judge.

A.L. Lockhart, Director of the Arkansas Department of Correction, appeals the district court's grant of habeas corpus relief to Bobby Ray Fretwell on the ground that Fretwell had received ineffective assistance of counsel at his capital felony murder trial. Fretwell cross-appeals, raising other claims of ineffective assistance of counsel. We affirm the district court's decision in part and remand for further proceedings consistent with this opinion.

I.

In August 1985, Fretwell was tried and convicted of capital felony murder in Searcy County, Arkansas. The jury found that Fretwell had murdered Sherman Sullins in the course of a robbery.[1] At a separate sentencing hearing,[2] the state argued that the evidence admitted during the guilt phase of Fretwell's trial established the following two aggravating circumstances: that the capital

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[1] A more complete account of the trial can be found in *Fretwell v. Lockhart*, 739 F. Supp. 1334, 1334-36 (E.D. Ark. 1990).

[2] Arkansas has adopted a bifurcated capital sentencing scheme. First, the jury must find the defendant guilty of a capital crime. Ark. Stat. Ann. §41-1501(1)(a) (Repl. 1977) (presently codified at Ark. Code Ann. §5-10-101(a)(1) (1987)). Then, after finding a defendant guilty, the court must hold a separate sentencing hearing to determine whether the defendant should receive the death penalty or life imprisonment without parole. At the sentencing hearing, the jury is specifically instructed to weigh aggravating circumstances against mitigating circumstances. If the jury finds no aggravating circumstances, then the jury does not reach the weighing stage and must impose a sentence of life imprisonment without parole. Arkansas defines an exhaustive list of aggravating circumstances and a nonexhaustive list of mitigating circumstances to be used by the jury in its death penalty decisions. Ark. Stat. Ann. §41-1301 to 1303 (Repl. 1977) (presently codified at Ark. Code Ann. §5-4-602 to 604 (1987)).



felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody; and that the capital felony was committed for purposes of pecuniary gain. Fretwell's attorney argued that these allegations did not constitute valid aggravating circumstances and that Fretwell's difficult and disadvantaged childhood constituted a mitigating factor. The trial court instructed the jury on the two aggravating circumstances requested by the state. Fretwell's attorney did not object. The trial court also instructed the jury on the one mitigating circumstance raised by Fretwell's attorney. The jury found that only the pecuniary gain aggravating circumstance was present and that there were no mitigating circumstances. Based on these findings, the jury concluded that Fretwell's punishment should be death.

Fretwell's conviction and sentence were affirmed on direct appeal in 1986 by the Arkansas Supreme Court. *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986). Fretwell's collateral attacks in state courts on his conviction and sentence were unsuccessful. Fretwell then filed a habeas petition in federal district court, claiming that the trial court erred in refusing to set aside the jury's verdict as being contrary to the evidence and that he received ineffective assistance of counsel. Fretwell argued that his counsel was ineffective because counsel failed to object to the aggravating circumstances jury instructions; because counsel failed to prepare and present evidence at the suppression hearing on Fretwell's confession; because counsel argued for an erroneously-worded jury instruction on the lesser included offense of first degree murder; and because counsel failed to investigate or prepare for the sentencing phase. The district court held that Fretwell was procedurally barred from raising his first claim and rejected two of the ineffective assistance of counsel claims, but granted relief on the claim that trial counsel was ineffective because he failed to object to the jury

instructions on aggravating circumstances.[3] The district court noted that seven months before Fretwell's trial, the Eighth Circuit had held that the Constitution is violated when a trial court uses pecuniary gain as an aggravating circumstance in robbery/murder cases because such double counting does not genuinely narrow the class of persons eligible for the death penalty. See *Collins v. Lockhart*, 754 F.2d 258, 263-64 (8th Cir. 1985). The district court then held that under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Fretwell's counsel was ineffective. First the district court held that Fretwell's counsel violated his duty to be aware of all law relevant to Fretwell's death penalty case. It further held that the error was prejudicial under *Strickland* because the jury found only one aggravating circumstance that Fretwell had committed the murder for pecuniary gain. The district court stated that it was confident that, had Fretwell's counsel objected, the trial court would have followed *Collins* and thus would not have issued the pecuniary gain instruction. Consequently, the jury would have found no aggravating circumstances and it would have had no choice but to sentence Fretwell to life imprisonment without parole. Having held that Fretwell's trial counsel was ineffective, the district court granted habeas relief, conditionally vacating Fretwell's death sentence. The district court gave the State of Arkansas the option to conduct another sentencing hearing within ninety days. If no such hearing were held, the district court ordered that Fretwell's sentence be permanently reduced to life imprisonment without the possibility of parole. Lockhart appeals this decision and has received a temporary stay of

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[3] The district court did not address Fretwell's claim that his counsel failed to investigate or prepare for the penalty phase because it found that ineffectiveness of counsel was established by counsel's failure to object to the aggravating circumstances instructions.



the tolling of the ninety-day period while we resolve this appeal. Fretwell cross-appeals the district court's dismissal of his other ineffective claims, requesting that his sentence be unconditionally reduced to life imprisonment without parole, or in the alternative that he be resentenced under the law that was in effect at the time of his first trial.

II.

Lockhart argues on appeal that Fretwell was not denied effective assistance of counsel by his counsel's failure to make an objection based on *Collins* to the pecuniary gain instruction. Lockhart argues that even if Fretwell's attorney had objected to the pecuniary gain instruction, the trial court would probably have overruled the objection because *Collins* was a "lawless" decision. Lockhart contends that *Collins* was clearly inconsistent with the Supreme Court's decisions in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), and *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), and therefore lacked any precedential value. As evidence of the "lawless" nature of the *Collins* decision, Lockhart cites a later Supreme Court decision permitting the use of an element of a capital crime as an aggravating circumstance in the sentencing phase, *see Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), and this court's subsequent decision to overrule *Collins*, *see Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989). Fretwell argues that the trial court would have sustained a *Collins* objection had Fretwell's counsel raised the issue because *Collins* was good law at the time of his trial.

Since all the claims Fretwell raises on appeal involve his right to effective assistance of counsel, we begin our analysis with the standard set by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, an ineffective assistance of counsel claim will succeed only if

(1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced petitioner's defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. The district court found that the performance of Fretwell's trial counsel was deficient because he was ignorant of *Collins*. Lockhart does not challenge this finding, nor do we. Therefore, the only question is whether this deficient performance prejudiced Fretwell's defense.

Lockhart claims that, at the time of Fretwell's trial, the Supreme Court case law would have led the trial court to overrule a *Collins* objection. We disagree. In *Jurek*, the Supreme Court considered whether the legislature could narrow the class of individuals eligible for the death penalty at the guilt phase instead of at the sentencing phase. *Jurek* involved a capital sentencing scheme that requires a court to conduct a separate sentencing proceeding after a defendant is convicted of a capital offense. *Jurek*, 428 U.S. at 267, 96 S.Ct. at 2954. During this punishment phase, both parties can present evidence and make arguments regarding the appropriate sentence. At the conclusion of the sentencing proceeding, the trial court must present the jury with questions[4] which, if answered in the affirmative, mandate the imposition of the death penalty. *Id.* The Supreme Court

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In *Jurek*, Texas law required that the jury answer "yes" to the following questions:

(1) whether the conduct of the defendant that cause the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any by the deceased.

Tex. Code Crim. Proc. , art. 37.071(b) (Supp. 1975-76).



reasoned that these questions allow the jury to consider mitigating circumstances that might militate against imposing the death penalty. Since the Texas capital sentencing scheme requires the jury to find at least one aggravating circumstance in the guilt phase and allows the jury to consider mitigating circumstances in the sentencing phase, the Supreme Court held that the scheme was constitutional.[5] *Id.* at 276, 96 S.Ct. at 2958.

The question before the Court in *Jurek* was whether the state legislature could narrow the class of individuals eligible for the death penalty at the guilt phase by narrowing its definition of capital murder. The Court held that such narrowing is permissible. *Id.* at 276,96 S.Ct. at 2958. Lockhart argues that *Jurek* permitted Arkansas to accomplish the requisite narrowing by including the

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[5] The Supreme Court has held that the Constitution requires capital sentencing schemes to fulfill two requirements. First, the scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. at 877, 103 S.Ct. at 2742. Second, the scheme "may not limit the sentencer's consideration of any relevant evidence that might lead it to decline to impose the death penalty." *Criminal Procedure Project*, 79 Geo.L.J. 1089, 1129-30 (citing *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion); *McCleskey v. Kemp*, 481 U.S. 279, 304, 107 S.Ct. 1756, 1773, 95 L.Ed.2d 262 (1987); *Sumner v. Shuman*, 483 U.S. 66, 81-82, 107 S.Ct. 2716, 2725-2726, 97 L.Ed.2d 56 (1987); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99, 107 S.Ct. 1821, 1824-25, 95 L.Ed.2d 347 (1987); *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion)). The use of aggravating circumstances satisfies the first requirement, *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (per curiam), and the consideration of mitigating circumstances satisfies the second requirement, *Lockett v. Ohio*, 438 U.S. 586, 606-07, 98 S.Ct. 2954, 2965-66, 57 L.Ed.2d 973 (1978) (plurality opinion); *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct 869, 874, 71 L.Ed.2d 1 (1982).

aggravating circumstance of pecuniary gain at the guilt phase. He argues that the statutory requirement that the jury find at least one aggravating circumstance in the sentencing phase is superfluous and does not obviate the narrowing that was already performed in the guilt phase. Lockhart's reliance upon *Jurek* is misplaced. The Court in *Jurek* did not address the question of whether a state can use the same aggravating circumstance in both the guilt phase and the sentencing phase. That question was resolved by the Supreme Court in *Lowenfield*, which was decided more than three years after Fretwell's trial. See *Lowenfield*, 484 U.S. at 246, 108 S.Ct. at 555. Furthermore, the capital sentencing scheme reviewed by the Court in *Jurek* was significantly different from Arkansas' capital sentencing scheme. Arkansas requires that the jury balance aggravating and mitigating circumstances in deciding whether the death penalty is appropriate. In *Jurek*, the Court viewed the sentencing phase questions only as an opportunity for the jury to consider mitigating circumstances. Since the Supreme Court reviews the constitutionality of a particular death sentence in the specific context of the state's capital sentencing scheme, *see Zant v. Stephens*, 462 U.S. at 890, 103 S.Ct. at 2749, *Jurek* does not make a definitive statement about Arkansas' capital sentencing scheme.

In *Zant v. Stephens*, another case cited by Lockhart to show that *Collins* was lawless when it was decided, the Supreme Court held that a subsequent invalidation[6] of an aggravating circumstance would not justify reversal of the defendant's sentence if there were other valid

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[6] The Court noted that an aggravating circumstance that was invalidated because it was constitutionally impermissible or totally irrelevant, e.g., the race, religion, or political affiliation of the defendant; or because the circumstance should militate in favor of a lesser penalty, e.g., defendant's mental illness, would require the death sentence to be set aside. *Zant v. Stephens*, 462 U.S. at 885, 103 S.Ct. at 2747.



aggravating circumstances, where the capital sentencing scheme required that one or more aggravating circumstances be found. 462 U.S. at 890, 103 S.Ct. at 2749. Lockhart argues that *Zant* reiterates the Supreme Court's ruling in *Jurek*, which allows states to perform the requisite constitutional narrowing during the guilt phase of a capital felony. Apparently, Lockhart is arguing that even if the sentencing phase finding of an aggravating circumstance is invalidated, the death penalty sentence must stand because the jury has already found the aggravating circumstance of pecuniary gain at the guilt phase. However, in *Zant*, the Court reiterated the importance of considering the capital sentencing scheme in death penalty decisions, and specifically limited its holding by stating:

> [W]e do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.

*Zant*, 462 U.S. at 890, 103 S.Ct. at 2750. Therefore, since the Arkansas capital sentencing scheme requires the jury to balance aggravating and mitigating circumstances, Zant did not preclude the result in *Collins*.

Nor does the fact that we have interpreted the Supreme Court's decision in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), as overruling *Collins*, *see Perry*, 871 F.2d at 1393, support Lockhart's claim that the Fretwell trial court woulld have ignored a *Collins* objection. First, as lockhart acknowledge, both *Lowenfield* and *Perry* were decided more than three years after Fretwell's trial and consequently do not support his claim that *Collins* was "lawless". Second, Lockhart's claim that *Lowenfield's* reasoning applies to the Arkansas

sentencing scheme ignores the significant difference between the Arkansas capital sentencing scheme and the *Lowenfield* scheme.[7] In *Lowenfield*, the Louisiana capital sentencing scheme defined the crime of capital murder to include aggravating circumstances. The scheme also required the jury to find at least one aggravating circumstance at the sentencing phase before the jury could impose the death penalty. If the jury found at least one aggravating circumstance, then the Louisiana scheme directed the jury to consider any mitigating circumstances before imposing the death penalty. The Court held that Louisiana's capital sentencing scheme was constitutional, even though the scheme allowed the jury to use the same aggravating circumstance of pecuniary gain at both the guilt phase and the sentencing phase. *Lowenfield*, 484 U.S. at 246, 108 S.Ct. at 555. The Court stated that the use of aggravating circumstances was "a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion" and that *Jurek* permitted this narrowing to take place at either the guilt phase or the sentencing phase. *Id.* at 244-45, 108 S.Ct. at 554-55. The Court concluded that Louisiana performed the requisite narrowing at the guilt phase. Therefore, since the narrowing had already occurred, the requirement that a jury find at least one aggravating circumstance at the sentencing phase was superfluous and did not violate the Constitution. *Id. at* 246, 108 S.Ct. at 555. The Louisiana sentencing scheme differs significantly from the Arkansas scheme in that Arkansas directs the jury to weight aggravating circumstances against mitigating circumstances before imposing the death penalty; Louisiana merely requires that the jury find at least one aggravating circumstance and then consider mitigating

[7] In fact, the *Lowenfield* scheme was more like the *Zant* scheme than it was like the Arkansas scheme in that the schemes in *Lowenfield* and *Zant* do not require the jury to weigh mitigating and aggravating circumstances, while the Arkansas scheme does.



circumstances. *See Zant v. Stephens*, 462 U.S. at 890, 103 S.Ct. at 2749 (specifically limiting holding to exclude statutory schemes that require the sentencer to weigh aggravating and mitigating circumstances).

While the Supreme Court has not required states to adopt any particular capital sentencing scheme, *Spaziano v. Florida*, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984), the Court places great importance on the specifics of a state's sentencing scheme when reviewing the constitutionality of a death sentence. *See Zant v. Stephens*, 462 U.S. at 874-75, 103 S.Ct. at 2741-42 (quoting *Gregg v. Georgia*, 428 U.S. 153, 195, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859 (1976)). Therefore, Lockhart's claim that *Collins* was lawless requires us to pay close attention to the sentencing schemes reviewed in the specific cases. *Jurek* involved a capital sentencing scheme in which the constitutional narrowing of the class of defendants eligible for the death penalty occurred at the guilt phase, in the form of a narrowly defined capital murder statute. The jury was then allowed to consider mitigating circumstances in a separate sentencing phase. In *Zant*, the court reviewed a death sentence in the context of a capital sentencing scheme that accomplished the constitutional narrowing at the sentencing phase. This scheme required the jury to find one or more statutory aggravating circumstances before a defendant was eligible for the death penalty. Only if the jury found one or more statutory aggravating circumstances was it to consider any mitigating circumstances. After considering the mitigating circumstances, the jury was then required to decide whether to impose the death penalty. The capital sentencing scheme in *Lowenfield* was a hybrid of the *Jurek* and *Zant* schemes. The *Lowenfield* scheme performed the constitutional narrowing at the guilt phase, like the *Jurek* scheme, by including aggravating circumstances in the statutory definition of capital murder. However, the *Lowenfield* scheme also required the jury to find at least one aggravating circumstance at the sentencing phase.

Since the jury had already found one aggravating circumstance at the guilt phase, the sentencing phase aggravating circumstance requirement would always be met. After meeting the aggravating circumstance requirement, the jury was then directed to consider any mitigating circumstances before deciding whether to impose the death penalty. The Arkansas capital sentencing scheme significantly differs from the schemes in *Jurek*, *Zant*, and *Lowenfield* because it requires the jury to weigh aggravating circumstances against mitigating circumstances in the sentencing phase. Because of this difference and because of the analytical complexity of the issues involved, we reject Lockhart's claim that the trial court would have employed the *Lowenfield* reasoning to a *Collins* objection and thereby concluding that *Collins* was lawless.[8]

Having rejected Lockhart's claim that *Collins* was lawless at the time of Fretwell's trial, we now turn to whether a state trial court would have sustained a *Collins* objection to the instruction on pecuniary gain as an aggravating circumstance. Since we have already determined that the precedent that existed at the time of Fretwell's trial was not clearly inconsistent with *Collins* and since state courts are bound by the Supremacy Clause to obey federal constitutional law, we conclude that a reasonable state trial court would have sustained an objection based on *Collins* had Fretwell's attorney made

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[8] In *Perry*, we extended *Lowenfield's* holding to cover Arkansas' sentencing scheme. This fact alone does not render *Collins* lawless. There is no question that *Collins* was "good" law at least until *Lowenfield*. The fact that we held *Lowenfield* to apply retroactively to the Arkansas scheme, *see Perry*, 871 F.2d at 1394, does not affect our analysis in this case. Fretwell does not challenge the authority of the Arkansas capital sentencing scheme. Such a challenge would fail under a retroactive application of *Lowenfield*. Rather, the question before us is whether Fretwell's trial court, at the time of his trial, would have followed *Collins*. The retroactive nature of *Lowenfield* cannot dispositively resolve this question.



one. Therefore, the district court correctly found that Fretwell's sixth amendment right to effective assistance of counsel was violated.

The situation in *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), relied on by the dissent, was totally different than in the present case. In *Nix*, the defendant was attempting to subvert the judicial process by lying under oath. The attempted perjury in that case bears no analogy to Fretwell's entitlement to rely on a case that was good law at the time he would have used it. The concurrence in *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), also relied upon by the dissent, argues that the court must grant relief only when the "fundamental fairness of the trial" was affected by trial error. Perhaps determining fundamental fairness is a subjective analysis, but this court already has extended the benefit of *Collins* to several prisoners because it would be an "extreme inequity" to do otherwise. See *Woodard v. Sargent*, 806 F.2d 153 (8th Cir. 1986); *Ruiz v. Lockhart*, 806 F.2d 158 (8th Cir. 1986). In our view, fundamental unfairness exists when a prisoner receives a death sentence rather than life imprisonment solely because of his attorney's error.

Our decision in *Perry* does not alter our approach. The *Perry* case involved a direct constitutional challenge to the sentencing scheme, not an ineffectiveness of counsel claim. The *Kimmelman* Court acknowledged that ineffective assistance of counsel claims are viable in habeas even if the underlying substantive violation does not directly relate to the defendant's guilt or innocence. 477 U.S. at 379-80, 106 S.Ct. at 2585-86. Because Fretwell can show prejudice, defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984), he is entitled to relief.

The district court's order granting habeas relief invalidated Fretwell's original sentence. This order allowed the state to resentence Fretwell within ninety days; however, if the state fails to hold such a hearing,

Fretwell's sentence will be reduced to life imprisonment without parole. We do not believe that a new sentencing hearing should be held. As Fretwell points out in his brief, to resentence him under current law would perpetuate the prejudice caused by the original sixth amendment violation. The dissent argues that applying *Collins*, as should have been done originally, conflicts with our decision in *Perry*, where, in overruling *Collins*, we applied *Lowenfield* retroactively and reinstated the defendant's death sentence. This argument overlooks the fact that the defendant in *Perry* was sentenced to death under the Arkansas sentencing scheme at least three years before *Collins* was decided. *See Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982). Thus, he was not entitled to the benefits of an undisturbed, retroactively applied *Collins* after it had been overruled. Fretwell, however, was sentenced while *Collins* was good law, and was entitled to its benefits *at the time of his sentencing*.

The only remedy that will remove the prejudice he suffered is the reduction of his sentence to life without parole. Therefore, we remand this case to the district court to modify its order to reduce unconditionally Fretwell's sentence to life imprisonment without parole. Since Fretwell's claims of ineffective assistance of counsel at the guilt phase are without merit, we affirm the district court's denial of relief on those claims.

III.

For the foregoing reasons, we affirm, in part, the district court's grant of habeas relief and remand for proceedings consistent with this opinion.

LOKEN, Circuit Judge, dissenting:

I respectfully dissent for two reasons. First, the majority holds that Fretwell received constitutionally ineffective assistance of counsel because trial counsel failed to object to an aggravating circumstances instruction that was proper under *Lowenfield v. Phelps*, 484 U.S. 231



108 S.Ct. 546, 98 L.Ed.2d 568 (1988). I conclude that this ineffective assistance claim cannot satisfy the prejudice requirement of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Second, the majority holds that Arkansas must resentence Fretwell to life imprisonment. I conclude that this remedy exceeds the authority of a federal habeas court and conflicts with our prior decision in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959, 110 S.Ct. 378, 107 L.Ed.2d 363 (1989).

I.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 104 S.Ct. at 2064. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Id.* at 691-692, 104 S.Ct. at 2066-2067. With this, the Supreme Court laid the foundation for analyzing claims of ineffective assistance of counsel. The Court then enunciated its now-familiar ineffectiveness and prejudice test for determining whether counsel's assistance was so defective as to require reversal of a death sentence.

Proof of prejudice is an essential prerequisite to relief under *Strickland*. When dealing with issues relating to counsel's performance during a trial or sentencing hearing, proof of prejudice normally and quite logically focuses on the time in question. The prejudice test adopted in *Strickland* -- "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," 466 U.S. at 694, 104 S.Ct. at 2068 -- reflects that focus. In this case, the majority limits its analysis entirely to that focus and concludes that Fretwell was prejudiced because his sentence probably

would have been different had his counsel made a *Collins* objection.

However, there is something more to *Strickland's* concept of constitutional prejudice. That something more is best illustrated by *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), a case in which trial counsel persuaded the defendant not to commit perjury by threatening to expose the perjury if he did. The defendant testified truthfully, was convicted, and on appeal claimed ineffective assistance. As two commentators have noted, "All nine Justices concluded that, even if defense counsel acted incompetently and even if that action had the requisite effect on outcome, counsel's behavior still would not have been prejudicial. The reason was apparently that perjury is criminal conduct that detracts from the reliability of judgments." Jeffries & Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U.Chi.L.Rev. 679, 686 (1990). Justice Blackmun, in a concurring opinion for four Justices, put it more bluntly: "Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice." 475 U.S. at 186-187, 106 S.Ct. at 1004-1005.

This aspect of the prejudice analysis was more fully articulated in Justice Powell's concurring opinion in *Kimmelman v. Morrison*, 477 U.S. 365, 392, 106 S.Ct. 2574, 2591, 91 L.Ed.2d 305 (1986). Morrison was convicted of rape after his attorney failed to object to admission of an illegally seized bedsheet. The Court held that *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) did not bar this ineffective assistance claim. However, Justice Powell wrote separately to clarify that the Court in remanding was not resolving a *Strickland* prejudice issue that had not been argued:

> [T]he admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict.... Thus, the harm suffered by respondent in this case is not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall. Because the fundamental fairness of the trial is not affected, our reasoning in *Strickland* strongly suggests that such harm does not amount to prejudicial ineffective assistance of counsel under the Sixth Amendment.... [I]t would shake th[e] right [to effective assistance of counsel] loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall.



477 U.S. at 396-397, 106 S.Ct. at 2954-2955. *See also Woods v. Whitley*, 933 F.2d 321, 324 (5th Cir. 1991).

The majority and the district court have granted Fretwell just such a windfall. *Lowenfield* established that Fretwell's sentencing jury was given instructions that did not violate his Eighth Amendment rights. Moreover, this court in *Perry* held that *Lowenfield* did not create a new rule of law and therefore must be applied retroactively. 871 F.2d at 1394. By focusing only on the probable effect of counsel's error at the time of Fretwell's sentencing, the majority misses the broader and more important point that his sentencing proceeding reached neither an unreliable nor an unfair result. Consequently, we are granting Fretwell a constitutional "windfall" that, as Justice Powell warned in *Kimmelman*, loosens the ineffective assistance inquiry from its Sixth Amendment moorings.

Like Justice Blackmun in *Nix* and Justice Powell in *Kimmelman*, I conclude that a federal court has no power to grant habeas relief to Fretwell, a state prisoner, unless ineffective assistance of counsel has deprived him of a fundamentally fair sentencing, or of a specific constitutional right designed to guarantee a fair sentencing. *Lowenfield* and *Perry* establish that Fretwell

was deprived of neither. Accordingly, I would reverse the district court's grant of habeas corpus relief.

II.

Having concluded, erroneously in my view, that Fretwell was denied effective assistance of counsel, the majority orders Arkansas to resentence him to life imprisonment without parole. I dissent from this extraordinary intrusion into the state's authority to conduct this criminal proceeding consistent with current constitutional principles.

Presumably the majority limits the state's resentencing options to life imprisonment on the assumption that Fretwell's sentencing jury would have sentenced him to life if not instructed that pecuniary gain could be an aggravating circumstance. Of course, this assumption is highly speculative.[1] But the remedy is more than speculative, it goes beyond that afforded when *Collins* was still the law. Indeed, two of the four Arkansas prisoners who were resentenced prior to *Lowenfield* because of a *Collins* error received the death penalty upon resentencing. *See Perry*, 871 F.2d at 1394 n.7; *Ruiz v. State*, 299 Ark. 144, 772 S.W.2d 297 (1989).

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[1] I cannot agree that Fretwell would certainly have received a life sentence if his attorney had made a *Collins* objection and the trial court had not given the pecuniary gain instruction. The jury was instructed on two potential aggravating circumstances. Although it found only one, pecuniary gain, it concluded that the death penalty was appropriate. Thus, if pecuniary gain had not been charged, the jury would have had to change either its finding as to the other aggravating circumstance, or its conclusion as to the death penalty, to avoid an inconsistent sentencing verdict. It is sheer speculation for the majority to predict what decision that jury would have made.



More importantly, the majority's remedy conflicts with our prior decision in *Perry*, which overruled *Collins*. In *Perry*, we applied *Lowenfield* retroactively and reinstated the defendant's death penalty because he was not entitled to "the benefit of an undisturbed *Collins*...." *Perry*, 871 F.2d at 1394 n. 7. Thus, the majority's remedy, which goes beyond that of an "undisturbed *Collins*," is in clear conflict with *Perry*.

The proper remedy here should reflect three principles. First, Arkansas should be given an opportunity to resentence Fretwell; that has been the law since at least *In re Bonner*, 151 U.S. 242, 259-260, 13 S.Ct. 323, 326-327, 38 L.Ed. 149 (1894). Second, Arkansas should be permitted to seek the death penalty at the resentencing; otherwise, this court will be mandating a procedure in the name of *Collins*, an overruled case, that neither *Collins* nor the Constitution *ever* required. Because the first jury sentenced Fretwell to death, there is no Fifth Amendment double jeopardy bar if the state decides to seek that penalty at the resentencing. *Compare Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), *with Lockhart v. Nelson*, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988).

Finally, I would hold that, because *Lowenfield* is now the law, Arkansas must be permitted to instruct the jury at Fretwell's resentencing that pecuniary gain is a potential aggravating circumstance. Although this result might be viewed as depriving Fretwell of the benefit of *Collins*, the law has changed, and it has been clear for nearly a century that procedural or evidentiary changes in the law may constitutionally be applied at a criminal defendant's second trial or resentencing. *See Thompson v. Missouri*, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898) (evidence declared inadmissible at first trial may be admitted at second trial under new statute authorizing its admission), cited approvingly in *Dobbert v. Florida*, 432

U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977).[2] In addition, the nature of the federal habeas corpus remedy compels this result, for it is surely beyond our habeas corpus powers to prohibit the state from conducting the resentencing proceeding in a manner wholly consistent with the Constitution. *See* 28 U.S.C. §2254(a).

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[2] *See also Evans v. Thompson*, 881 F.2d 117 (4th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3255, 111 L.Ed.2d 764 (1990); *Coleman v. Saffle*, 869 F.2d 1377, 1385-1387 (10th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1835, 108 L.Ed.2d 964 (1990); *Hulsey v. Sargent*, 821 F.2d 469, 471 (8th Cir.), *cert. denied*, 484 U.S. 930, 108 S.Ct. 299, 98 L.Ed.2d 258 (1987); *United States v. Sager*, 743 F.2d 1261 (8th Cir. 1984), *cert. denied*, 469 U.S. 1217, 105 S.Ct. 1196, 84 L.Ed.2d 341 (1985).



Bobby Ray FRETWELL, Plaintiff

v.

A.L. LOCKHART, Director, Arkansas Department of Correction, Defendant.

No. PB-C-87-316.

United States District Court, E.D. Arkansas Pine Bluff Division

June 29, 1990.

Richard Medlock, Little Rock, AR for plaintiff

Clint Miller, Asst. Atty. Gen., Little Rock, AR for defendant

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## MEMORANDUM OPINION

ROY, District Judge.

Before the Court is the Petition for Writ of Habeas Corpus of Bobby Ray Fretwell, petitioner herein, to which respondent has fully responded. After numerous and lengthy delays, the Court has carefully reviewed all pleadings and submissions of both parties and the petition is ripe for consideration on its merits.

Early on the morning of December 14, 1984, petitioner gained entry into the home of Sherman Sullins, a resident of Marshall, Arkansas. Petitioner proceeded to rob Mr. Sullins of his money at gun point and struck him on the head with the weapon. When that blow failed to render Sullins unconscious, petitioner placed the barrel of the gun against Sullins' temple and shot and killed him. Petitioner then took the keys to Sullins' pick-up truck and fled, along with petitioner's wife and another companion, in that vehicle. Petitioner and his companions were ultimately arrested in the State of Wyoming while traveling in Sullins' truck. The murder weapon was subsequently found in the truck.

Petitioner was returned to Arkansas and charged with capital murder in the slaying of Sherman Sullins. A plea of not guilty by reason of insanity was initially entered on petitioner's behalf, but that plea was withdrawn after psychological and psychiatric examinations revealed that petitioner was competent both at the time of the commission of the offense and the time of trial. Trial counsel for petitioner then attempted to persuade the trial court to permit petitioner to plead guilty to capital murder in exchange for an agreement to sentence petitioner to life imprisonment without the possibility of parole. The trial court denied that request when the prosecuting attorney objected, as was his right under Arkansas law.

Trial counsel filed a number of pre-trial motions, most notably a motion to suppress several confessions given by petitioner, first to the authorities in Wyoming and later to those in Arkansas. On August 6, 1985, just prior to the beginning of the guilt phase of petitioner's trial, the trial court conducted a hearing on the motion to suppress. After hearing testimony from law enforcement officials from Wyoming and Arkansas, from a psychologist and a psychiatrist from the Arkansas State Hospital, and from petitioner himself, the trial court concluded that petitioner had made a knowing and intelligent waiver of his right against self-incrimination and that the confessions had been voluntarily given. The motion to



suppress was denied.

After considering the overwhelming evidence against his client and the circumstances surrounding the crime, trial counsel determined that it was in his client's best interest to admit his culpability to the jury and appeal to their mercy in an attempt to avoid imposition of the death penalty. The record reflects that petitioner agreed with trial counsel's strategy and willingly went along with it. Rather than put the prosecution to its burden of proving petitioner's guilt, trial counsel and petitioner admitted his culpability throughout the guilt phase of the trial and appealed for mercy, either by a conviction for first degree murder or imposition of a sentence of life without parole. Petitioner was convicted of capital murder on August 7, 1985.

Immediately after the jury returned its verdict of guilty on the charge of capital murder, the trial court commenced the sentencing phase of the trial. The prosecution declined to put on any additional evidence of aggravating circumstances beyond that adduced during the guilt phase. Trial counsel called both petitioner and Dr. Douglas Stevens, a clinical psychologist, as witnesses on petitioner's behalf in an effort to establish mitigating circumstances. In the closing arguments, the prosecution argued that the evidence had established the existence of two aggravating circumstances -- one, that the murder was committed for pecuniary gain; and two, that the murder was committed to facilitate petitioner's escape. Trial counsel argued that neither of those allegations constituted valid aggravating circumstances under the law and that the evidence had clearly established that petitioner's difficult and disadvantaged childhood was a mitigating factor for the jury.

The trial court submitted the two aggravating circumstances advanced by the prosecution for the jury's consideration. After deliberating for approximately six and one-half hours, the jury found that petitioner had committed the murder for pecuniary gain and found no

mitigating factors in petitioner's favor. The jury determined that petitioner's punishment should be death.

Petitioner's conviction and sentence were affirmed on appeal to the Supreme Court of Arkansas in 1986. *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986). Petitioner's subsequent petition for post-conviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure was denied on April 27, 1987. *Fretwell v. State*, 292 Ark. 96, 728 S.W.2d 180 (1987). Thereafter, on May 27, 1987, petitioner filed the petition now before this Court.

Petitioner advances the following five grounds for relief from his conviction and sentence:

1. Petitioner was denied effective assistance of counsel at the guilt phase of his trial in violation of his rights under the Sixth and Fourteenth Amendments.
2. Petitioner was denied effective assistance of counsel at the guilt phase of his trial in violation of the Sixth and Fourteenth Amendments because counsel failed to prepare and present evidence at the suppression hearing on defendant's confession.
3. Petitioner was denied effective assistance of counsel at the guilt phase of his trial in violation of his rights under the Sixth and Fourteenth Amendments because counsel argued for the inclusion of an erroneously worded jury instruction on the lesser included offense of first degree murder.
4. Petitioner was denied effective assistance of counsel at the penalty phase of his trial in violation of his rights under the Sixth and Fourteenth Amendments because counsel failed to investigate or prepare for the penalty phase.



5. The trial court erred in refusing to set aside the verdict as being contrary to the evidence.

Petitioner's fifth ground for relief, that the trial court erred in refusing to set aside the verdict, was not raised on appeal to the Supreme Court of Arkansas. Further, no explanation for the failure to raise that point on appeal has been advanced. Accordingly, review of that claim in this federal habeas corpus proceeding is barred. See *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *see also Stokes v. Armontrout*, 893 F.2d 152 (8th Cir. 1989).

In his second ground for relief, petitioner contends that he was denied effective assistance of counsel during the guilt phase by trial counsel's failure to prepare and present evidence at the suppression hearing. The Court has thoroughly reviewed the transcript of the suppression hearing held on August 6, 1985. Trial counsel objected to holding the hearing at that time due to the unavailability of his expert witness, Dr. Stevens, at that time. That objection was overruled. It is apparent from the transcript that trial counsel had indeed prepared a strategy for the suppression hearing. Every witness was questioned about the coercive effect of petitioner's arrest and questioning in Wyoming, and the possible exacerbation of that effect by fatigue. The state's experts were also questioned about the possibility of petitioner being predisposed to coercion by certain personality traits. Finally, although Dr. Stevens was unable to attend the hearing, the trial court had trial counsel state on record what the substance of Dr. Stevens' testimony would have been and accepted that testimony as true for the purposes of the motion.

Allegations of ineffective assistance of counsel are governed by the holding of the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail upon such a claim, a petitioner must show that trial counsel's performance seriously undermined the proper functioning of the

adversarial process and that counsel's error resulted in prejudice so pronounced as to have deprived petitioner of a fair trial. In other words, the petitioner must establish a reasonable probability that a different result would have attained but for counsel's errors.

The Court finds that petitioner has failed to show in this case that trial counsel's performance with respect to the suppression hearing fell outside the range of reasonable professional assistance. Moreover, the evidence presented at the hearing was clearly sufficient to establish the voluntariness of petitioner's confessions. The Court is convinced that the suppression motion would have been denied regardless of trial counsel's conduct. From all the matters and circumstances presented, the Court finds no merit in this ground.

In ground three petitioner asserts that he was denied effective assistance of counsel during the guilt phase on account of trial counsel's insistence on the inclusion of an erroneous jury instruction on the lesser included offense of first degree murder. While other counsel may have preferred that the instruction be worded differently, the Court cannot say that trial counsel was ineffective because of his preference for the language used. Under the instructions given, the jury was advised that first degree murder is a lesser included offense of capital murder and that they could find petitioner guilty of either, or not guilty of both. The Court finds no significant deficiency in counsel's conduct on this point. Again, in light of the evidence presented and the circumstances attendant to this case, the Court is convinced that the jury would have convicted petitioner of capital murder regardless of the wording of the instructions. The jury took only 25 minutes to select a foreman and return its verdict of guilty on the charge of capital murder. The Court finds no merit in this ground for relief.

In his first ground for relief, petitioner contends



that he was denied effective assistance of counsel at the sentencing phase of the trial by counsel's failure to object to the submission to the jury of the aggravating circumstances of "pecuniary gain" and "escape."[1] Insomuch as the jury did not find that the murder was committed to facilitate an escape, petitioner was not prejudiced by the submission of that aggravating circumstance.

The Court does, however, have grave concern about trial counsel's failure to object to the trial court's submission to the jury of pecuniary gain as a potential aggravating circumstance in the sentencing phase of this robbery/murder case. Some seven months prior to petitioner's trial, the United States Court of Appeals for the Eighth Circuit had condemned the practice of submitting pecuniary gain as an aggravating circumstance in robbery/murder cases. *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), *cert. denied*, 474 U.S. 1013, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985).[2] Trial counsel was apparently unaware of *Collins*, for he failed to raise it at trial and on appeal. As an attorney representing a defendant in a capital murder case, trial counsel had a duty to be aware of all law relevant to death penalty cases. The Court finds trial counsel's ignorance of *Collins* to have been a serious and significant error. Having so found, the Court must now determine, pursuant to *Strickland*, whether this error had a prejudicial effect on the outcome of the trial.

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[1] The discussion under ground one does not square with the heading, so the Court has disregarded the heading in its discussion of this point.

[2] Although *Collins* was eventually overruled in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 378, 107 L.Ed.2d 363 (1989), it was the law in the Eighth Circuit for more than four years.

Two potential aggravating circumstances were submitted to the jury for their consideration in the sentencing phase of petitioner's trial. The jury unanimously found that only one -- that petitioner had committed the murder for pecuniary gain -- had been established. This Court is confident that the trial court would have followed the ruling in *Collins* had trial counsel made an appropriate motion. Although *Collins* has since been overruled, it was the law in the Eighth Circuit at the time of petitioner's trial and this Court has no reason to believe that the trial court would have chosen to disregard it. Thus, had the trial court declined to submit pecuniary gain as a possible aggravating circumstance, the jury would have had no option but to sentence petitioner to life imprisonment without parole. The prejudice to petitioner from counsel's error is obvious. The Court finds that petitioner was deprived of effective assistance of counsel during the sentencing phase of his trial. Having found ineffective assistance of counsel on this point, the Court will not address petitioner's ground concerning trial counsel's alleged failure to investigate or prepare for the penalty phase.

The sentence of death by electrocution imposed against petitioner shall be vacated and set aside. Unless the State of Arkansas decides to conduct another sentencing hearing in petitioner's case within ninety days of the date of the Judgment entered in accordance with this Memorandum Opinion, petitioner's sentence shall be reduced to life imprisonment without the possibility of parole.



# UNITED STATES COURT OF APPEALS

## FOR THE EIGHTH CIRCUIT

No. 90-2105EAPB

Bobby Ray Fretwell, *

Appellee. *

v. *

A.L. Lockhart, Director * Order Denying Petition for Rehearing and suggestion for Rehearing En Banc
Arkansas Department of *
Corrections, *

Appellant. *

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judges Fagg, Bowman, Wollman, Beam, and Loken voted to grant.

Rehearing by the panel is also denied.

December 4, 1991

Order Entered at the Direction of the Court:

/s/

Clerk, U.S. Court of Appeals, Eighth Circuit

# UNITED STATES COURT OF APPEALS

## FOR THE EIGHTH CIRCUIT

No. 90-2105EAPB / 90-2315EA

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| Bobby Ray Fretwell,<br><br>Appellee.<br><br>v.<br><br>A.L. Lockhart, Director<br>Arkansas Department of<br>Corrections,<br><br>Appellant. | * | Appeal from the United States District Court for the Eastern District of Arkansas |

Appellant's motion to recall the mandate has been considered by the court and is hereby granted. The clerk of the district court is hereby directed to return the previously issued mandate in this case to this court.

December 30, 1991

Order Entered at the Direction of the Court:

/s/

Clerk, U.S. Court of Appeals, Eighth Circuit